

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition for Rulemaking of Fibertech)	RM-11303
Networks, LLC)	

To: The Commission

COMMENTS OF QWEST COMMUNICATIONS

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Qwest Communications (“Qwest”) hereby files these comments in response to Fibertech Networks, LLC’s (“Fibertech”) Petition for Rulemaking in the above-captioned docket.¹

I. INTRODUCTION AND SUMMARY

Qwest is a significant pole and conduit owner as well as an attacher. Although the numbers are fluid given the nature of the business, currently, Qwest owns or jointly owns approximately 875,000 poles and attaches to over one million poles that it does not own. Over 150 entities, including competitive local exchange carriers (“CLECs”) and cable television providers attach to nearly one-half million Qwest-owned poles. With respect to conduit occupancy, currently, over 50 entities occupy approximately four million feet of Qwest-owned conduit. Qwest has been providing others access to its poles and conduit for many years and has been very successful in negotiating contracts which resolve the access issues raised by Fibertech. This is true for Qwest both as an owner and as an attacher. Qwest’s extensive experience with these issues leads Qwest to advocate against the Federal Communications Commission (“Commission”) instituting a rulemaking to address the rules that Fibertech is proposing.

¹ See *Public Notice*, DA 05-3182, rel. Dec. 14, 2005. And see *Order* extending comment filing date, DA 06-42, RM-11303, rel. Jan. 10, 2006.

Contrary to Fibertech's claims, most of its proposed rules do not reflect best practices in the industry. Additionally, promulgating additional rules on these specific, detailed issues is unnecessary, and runs counter to the Commission's existing policy that these issues are best addressed on a case-by-case basis through negotiation between the owner and attachers.

With respect to the substance of the specific proposed rules, Qwest views that Fibertech proposes erroneous criteria for determining the use of boxing or extension arms for pole attachments, that it is not appropriate to impose a time limit on the completion of make-ready work, that conduit and pole owners must be allowed to inspect and supervise the work of others on their property, that existing Qwest rates for conducting surveys and record searches and performing make-ready work are already reasonable as determined by state commissions, and that conduit owners should not be subject to novel requirements for placement of cable in conduit that significantly increases the risk of damage to existing facilities and interruption of service to existing customers.

II. THE COMMISSION SHOULD NOT INSTITUTE A RULEMAKING TO ADDRESS FIBERTECH'S PROPOSED RULES

It is not appropriate to address the issues raised by Fibertech with new categorical rules and requirements. The Commission has already recognized this principle in the *First Report and Order* in which the Commission concluded "that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis."² The Commission's

² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 16067-68 ¶ 1143 (1996) ("First Report and Order"), *aff'd in part and vacated in part sub nom.*, *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on remand*, *Iowa Utils Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002); *Order on Reconsideration*, 11

current process for addressing these issues is sufficient. Owners and attachers should continue to negotiate these access issues, and if negotiations are unsuccessful the Commission encourages mediation between the parties prior to filing a formal complaint.³

Not adopting specific rules on these issues is also consistent with the approach taken by the New York Public Service Commission (“NY PSC”) in the very Order that Fibertech relies so heavily upon in proposing these rules. In that Order, the NY PSC adopted a “policy statement” to guide pole attachment transactions between carriers rather than a set of precise rules.⁴ Consequently, Fibertech is asking this Commission to adopt specific legal requirements using criteria that have only been set out by the NY PSC as policy pronouncements. Fibertech has not presented any compelling reason for the Commission to deviate from its view that these access issues are best determined on a case-by-case basis.

A. Proposed Rule 1.1403(f)(1) Regarding The Use Of Boxing Or Extension Arms Is Unnecessary And Inappropriate

Proposed rule 1.1403(f)(1) requires pole owners to permit use of boxing or extension arms whenever three criteria are satisfied: (1) the use of boxing or extension arms could be used instead of replacing a pole or rearranging electric facilities; (2) the facilities on the pole can be reached by ladder or bucket truck; and (3) the pole owner has previously allowed use of boxing or extension arms. Qwest is not opposed to the use of boxing or extension arms. In fact, Qwest allows use of boxing or extension arms when a CLEC is attaching to a Qwest-owned pole, so long as Qwest has approved the specific request to use boxing or extension arms, and the boxing

FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12460 (1997).

³ See <http://www.fcc.gov/eb/mdrd/PoleAtt.html>.

⁴ See Fibertech Petition at Exhibit 3.

or extension arms are placed in accord with National Electrical Safety Code (“NESC”) guidelines. Qwest also requires that the boxing or extension arms be placed above the Qwest aerial facilities in a consistent manner on each pole in accord with Qwest’s standard design and construction practices. Qwest is, however, opposed to placing any categorical requirements on when the techniques *must* be used, and is opposed to the specific categorical requirements proposed here.

As already noted, the NY PSC Order on which Fibertech relies in proposing this rule provides only a policy statement on this issue. Moreover, that policy statement explicitly recognizes that determination of whether to use boxing or extension arms is not a decision that can be made categorically. Specifically, with respect to boxing the NY PSC states that “[t]here are many factors to consider when deciding whether to employ boxing techniques and it is difficult to prescribe specific conditions that can be applied universally. The determination of boxing shall be done on a case by case basis.”⁵ The NY PSC Order does not support the specific, categorical rule that Fibertech proposes here.

Not only are any categorical requirements to address the use of boxing or extension arms unnecessary, but the specific requirements proposed are flawed. Fibertech’s proposed rule language fails to address an important requirement of the NY PSC decision -- the issue of safety. The NY PSC’s policy states that “[b]oxing of poles should be allowed in certain circumstances recognizing that such attachments need to be in compliance with relevant safety codes,”⁶ and that any consideration of the permanent use of extension arms must consider whether that use “allows for safe and reliable attachments.”⁷ Fibertech’s Petition suggests that the issue of safety

⁵ *Id.* at Appendix to Order at 6.

⁶ *Id.*

⁷ *Id.* at 7.

recognized by the NY PSC was only that of worker safety.⁸ Qwest submits that the NY PSC policy does not intend to be so limited, but includes all applicable safety standards which are intended to promote worker safety as well as safety of the general public such as those regarding structural safety and those set out in NESC guidelines. Failure to include any direct consideration of safety concerns in the proposed rule language renders the criteria proposed by Fibertech for mandating the use of boxing or extension arms erroneous.

The proposed rule is unnecessary and even if it were needed, it fails to take into account the proper criteria for determining when use of boxing or extension arms is appropriate. Thus, the proposed rule 1.1403(f)(1) should not be adopted by this Commission.

B. Proposed Rule 1.1403(f)(2) Regarding Time Limits On Completion Of Field Surveys And Make-Ready Work Is Unwarranted

Qwest also opposes proposed rule 1.1403(f)(2). Proposed rule 1.1403(f)(2) requires that either the pole owner complete field surveys within 30 days of a completed application and complete make-ready work within 45 days of receiving payment for that work or the pole owner allow an attacher-hired-contractor to complete those field surveys or make-ready work. The crux of the rule is that if the pole owner does not complete the work in the requisite time period, it must permit an attacher's contractor to do so. There are problems with this proposed rule.

First, there is already an existing Commission rule that sufficiently addresses this issue. Commission rule 1.1403(b) states that requests for access to poles, ducts, conduits and rights-of-way must be in writing and that "[i]f the access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day."⁹ If pole owners are not acting in compliance with this provision, then such conduct can be addressed through a

⁸ See Fibertech Petition at 15.

⁹ 47 C.F.R. § 1.1403(b).

complaint proceeding. Qwest's practice is consistent with the existing rule. To the extent Fibertech finds pole owners that are not in compliance, the existing enforcement rules provide recourse.

Completion of make-ready work should not have an arbitrary time limit because of the variability of scope from project to project. If the project consists of attaching to ten poles, then it is likely that any make-ready work can be completed within 45 days. If the project is a 20-mile build-out, however, make-ready work could take longer. The existing rule appropriately requires pole owners to act promptly in responding to a request for access.

Second, there is not currently a sufficient record to conclude either that a set time period for completing make-ready work is needed or that 45 days is an appropriate length of time to complete such work. In reviewing the NY PSC Order that Fibertech points to as support for a 45-day window on completing make-ready work,¹⁰ it is not at all clear how the NY PSC came to the determination that as a policy matter (1) such a limit was necessary and (2) 45-days was an appropriate length of time to cover the full range of pole attachment requests. Qwest urges this Commission not to adopt any specific time frame for completing make-ready work, and certainly not to adopt any time limitation without a complete record justifying the selection of a particular limit.

C. Proposed Rule 1.1403(f)(3) To Allow Attachers To Hire Contractors To Complete Field Surveys And Make-Ready Work Is Already Reflected In Existing Law

In both proposed rule parts 1.1403(f)(2) & (3), Fibertech proposes that pole owners should be required to allow attachers to hire their own contractors to complete field surveys and make-ready work. Qwest is not opposed to the concept that an attacher be permitted to hire a

¹⁰ See Fibertech Petition at 17.

contractor to complete this work, so long as the contractor can demonstrate that it meets the objective qualifications for performing the work. In fact, this is what the *First Report and Order* requires.¹¹ Qwest permits attachers to hire contractors that have demonstrated the requisite qualifications to perform field surveys and make-ready work.

D. Proposed Rule 1.1403(f)(4) Regarding Aerial Drops Is Unnecessary And Incomplete

In proposed rule 1.1403(f)(4), Qwest has no objection to the concept that an aerial service wire could be placed prior to obtaining permission from the pole owner to do so, as long as the attacher already has a master license agreement with the pole owner. If, however, the aerial drop is the only attachment to the pole, the pole owner must receive notification of the aerial drop within a reasonable period after the line has been attached. This notification allows the pole owner to bill the attacher for the attachment. Qwest believes that a rule on this issue is unnecessary.

E. Proposed Rule 1.1403(f)(5) Regarding Conduit Record Searches And Manhole Surveys Is Unnecessary And Lacks A Sufficient Record

Proposed rule 1.1403(f)(5) relates to an attacher's¹² ability to conduct conduit record searches and manhole surveys. Proposed section 5(a) requires conduit owners to permit attachers to perform such searches and surveys; proposed section 5(b) prohibits a conduit owner from charging more than \$200 per manhole for record searches and manhole surveys that the conduit owner performs for the attacher, and proposed section 5(c) requires a conduit owner to allow the attacher to observe the conduit owner's performance of a conduit record search or manhole survey. Again, Qwest believes that making such interactions into categorical, binding

¹¹ *First Report and Order*, 11 FCC Rcd at 16083 ¶ 1182.

¹² In discussion on conduit occupancy in these comments, "attacher" refers to the entity seeking to occupy space in conduit owned by another party.

legal requirements is unnecessary and an overly burdensome intrusion into the arrangements between a conduit owner and an attacher.

With respect to proposed section 5(a), Qwest now routinely permits attachers to perform conduit record searches. Qwest, does not agree, however, that an attacher can perform a manhole survey of Qwest's manholes without a Qwest representative present. Qwest strongly objects to any rule that would interfere with Qwest's ability to protect its property.¹³

With respect to proposed section 5(b), Qwest's charges for employees to conduct record searches and manhole surveys have been thoroughly scrutinized and deemed reasonable in cost dockets before each of the fourteen state public service commissions in Qwest's incumbent local exchange territory. There is no need for this Commission to interfere with the rates that have been approved by the state commissions, and certainly not in the absence of a record as to what an appropriate rate might be. Currently, it appears that the sole basis for Fibertech proposing a cap of \$200 per manhole for record searches and manhole surveys is its own recent experience with Verizon where Verizon's costs according to Fibertech were approximately \$188 per manhole.¹⁴ This single experience is not a sufficient basis for placing a cap of \$200 per manhole on these activities, especially where existing costs have been carefully reviewed by state commissions.

With respect to proposed section 5(c), Qwest does not allow attachers to observe Qwest employees performing record searches and manhole surveys. Enabling such observation activities would require additional coordination that would likely delay processing of the access request that Qwest is working to complete in a timely manner. It would also result in additional

¹³ See Section II.G., *infra*.

¹⁴ Fibertech Petition at 30.

costs that were not previously contemplated and were not included in the cost dockets that set the current prices for performing record searches and manhole surveys.

F. Proposed Rule 1.1403(f)(6) Regarding Fee Documentation Is Unnecessary

Proposed rule 1.1403(f)(6) requires that a pole or conduit owner be able to document the fees charged for owner-performed surveys and make-ready work. Again, Qwest's charges have been scrutinized and deemed reasonable in cost dockets before state commissions. If a pole or conduit owner is not able to document the fees it has charged, the Commission's complaint and enforcement procedures are available to require the owner to justify the costs it has placed on access.

G. Proposed Rule 1.1403(f)(7) Prohibiting Supervision Of Work In Manholes Is Contrary To Conduit Owners' Needs To Protect Their Property And Address Safety And Homeland Security Concerns

Proposed rule 1.1403(f)(7) prohibits conduit owners from having its employees supervise work performed by or for the attachers in manholes. This proposed rule is over broad. Conduit owners must be permitted the option of supervising work performed by others in their manholes as a means of protecting their own and others' facilities from damage caused by contractors. Such supervision may not be necessary in all instances, but it should not be categorically eliminated.

Fibertech asserts that supervision is unnecessary especially since it is unaware of any damage caused by contractors to underground facilities. Qwest is aware of such damage. Qwest is currently dealing with a situation in Minnesota where a CLEC entered a Qwest manhole without supervision by Qwest, and caused damage to Qwest facilities. Without notice to Qwest, the CLEC knocked holes in the manhole in order to gain access to its customer's entrance conduit. The CLEC pulled fiber through an innerduct into Qwest's manhole, through one of

Qwest's conduits and exited through the customer's conduit. There is physical damage to the manhole, potential liability for Qwest due to the risk of damage to other working facilities in the vault and also a continued access and work space issue due to the loop of fiber left in the vault. It is this type of situation, while rare in Qwest's experience, that makes critical the choice of whether to supervise a contractor or not. In this instance Qwest was not able to supervise the CLEC's activities because Qwest was unaware of them. Had Qwest been able to supervise the CLEC's work in the manhole, it is highly unlikely that the damage and the ongoing heightened risk of damage would have occurred. A rule which would prohibit a conduit owner from supervising a contractor would simply increase the likelihood that this type of damage would occur.

Generally, Qwest does not require that make-ready work by an approved contractor be supervised by a Qwest employee or contractor. Qwest, however, does reserve the right in its contracts to perform construction inspections, with the CLEC paying for the cost of those inspections. A rule that prohibits conduit owners from supervising work performed on their own property is overly intrusive, confiscatory and unnecessary.

In addition to addressing damage concerns, a supervisor can also ensure that a contractor is attaching to the correct pole or is working in the correct manhole. A supervisor may also be better informed and able to provide guidance on any specific safety concerns for particular poles or manholes, such as manholes prone to foreign gases and water problems. Each manhole is physically different from the next manhole, and as the Commission has recognized, "[t]he installation and maintenance of underground facilities raise distinct safety and reliability concerns."¹⁵ As history has shown, improper entrance into manholes can cause death due to the

¹⁵ *First Report and Order*, 11 FCC Rcd at 16070-71 ¶ 1149.

presence of toxic deadly foreign gases or the absence of oxygen. If manholes are not entered properly, the integrity of the facilities can be jeopardized, and critical services lost not only in the manhole entered, but also in numerous adjoining manholes. This is especially true if pressurized cables are damaged. A company solely using fiber optic cabling may not be sufficiently knowledgeable about copper cable air pressurization and the damage that can result from loss of that pressure. Also, increasingly, there are homeland security issues that warrant increased supervision of work on telecommunications infrastructure. Supervision of contractors working in manholes will decrease the opportunity for damage to facilities that carry critical services such as 911 lines, Federal Aviation Administration lines, or other Telecommunications Service Priority circuits that warrant extra caution when working in particular manholes. Finally, supervision can help ensure that work is done correctly the first time and thus avoid additional work to fix mistakes. Given these damage, safety and homeland security concerns, it is not appropriate to have a rule that would prohibit a conduit owner from supervising work in its manholes.

H. Proposed Rule 1.1403(f)(8) Regarding Access To Conduit Is Inappropriate And Contrary To Qwest Practices

Proposed rule 1.1403(f)(8) requires incumbent local exchange carriers (“ILECs”) to permit access to building entry conduit either where the ILEC has placed cables in the building-entry conduit without innerduct or by allowing the attacher to use the interstices between innerduct to thread cable. Qwest opposes this proposed rule. Because the potential damage to existing cable and cable sheath is high in both of these scenarios, and there is also a high potential for damage to innerduct in the second scenario, Qwest does not permit either practice. First, generally, the only time that Qwest places cable in conduit without innerduct is in placing copper cable, which is usually too big for placement in an innerduct. Given the spiraling and

twisting of cable through the length of a conduit, an attempt to pull other cable through that same conduit creates sheath-to-sheath friction and a significant risk of damage to the existing cable and cable sheath. Placing multiple cables into the same conduit without innerduct separation between the cable sheaths is contrary to Qwest practices.

With respect to the second scenario, when Qwest places innerduct in conduit it usually places three innerducts at the same time. The innerducts will not remain flat and straight throughout the conduit, but will twist like strands in a rope inside the conduit. This creates a risk that attempting to pull a cable through the interstices between the innerducts is likely to damage the existing innerducts and the cable sheaths contained therein. There is a greater risk of damage in trying to pull cable through the interstices than there is in pulling cable through spare innerduct. Further, a cable sheath fault in mid-section along a conduit creates a very difficult repair circumstance. A cable damaged by this practice cannot simply be respliced at the fault, but instead must be completely severed, removed from the length of the conduit and replaced with an entirely new span of cable.

Fibertech's proposed practices could compromise the customer service that Qwest encourages its customers to expect. Qwest must protect the integrity of its network. Qwest's services are subject to many performance measures, and service quality metrics must be met or Qwest pays penalties. Qwest must be able to have sufficient control over the integrity of its network to be able to meet and exceed those performance measures and service quality requirements. If certain entities wish to engage in these practices, they can do so, but imposing a rule mandating use of these techniques is unwise. This rule would unnecessarily and inappropriately place additional burdens and risks on conduit owners to the unwarranted benefit of attachers.

III. CONCLUSION

For all of these reasons, Qwest recommends that the Commission deny Fibertech's Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS** to be 1) filed with the FCC via its Electronic Comment Filing System in RM-11303, 2) served via e-mail on Ms. Janice Myles, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission at janice.myles@fcc.gov, and 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier
Richard Grozier

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